92-1551

DOCKET NO._____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 19__

In re JESSIE D. McDONALD,
Petitioner,

On Application for Extraordinary Relief
to the Tennessee Supreme Court

PETITION FOR WRIT OF MANDAMUS and INJUNCTION

For the Petitioner:
Jessie D.McDonald, Pro se
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QUESTIONS FOR REVIEW

1. Whether the state supreme court failed to perform a ministerial duty, when it refused to issue an order on the pending application for permission to appeal, pursuant to Rule 11, of the Tennessee Rules of Appellate Procedure ?

2. Whether there has been a criminal offense committed, to justify jurisdiction to prosecute the petitioner ?

3. Whether §39-13-102,TCA is unconstitutional and void ?

4. Whether the indictment under the charge of aggravated assault, properly gave notice to the petitioner of the charges against him ?

Table of Contents

Subject	Page[s]
Questions for Review	2
Respondent Parties	45
Exceptional Circumstances	4
Table of Authorities	5-7
Opinions Below	8,9
Jurisdiction	9
Constitutional Provisions	9,10
Statement of Case	10-14
Reasons for Granting this writ:	14-26
The Tennessee Supreme Court has usurped its judicial powers by singling out the petitioner for invidious discrimination and refusing to render a final decision on his application for Permission to Appeal to the state supreme court; and refusing to exercise its appellate jurisdiction contrary to due process and equal protection under the Constitution of the United States.	
Conclusion	26,27
Relief Sought	27,28
Proof of Service	29
Appendix	30-45

EXCEPTIONAL CIRCUMSTANCES

This application is in aid of this Court's appellate jurisdiction and there are exceptional circumstances warranting the exercise of this Court's discretionary powers, in that the state supreme court has usurped its judicial powers, by singling out the petitioner for discrimination and refusing to render a final decision on his application for permission to appeal to the state supreme court, pursuant to Rule 11, of Tennessee Rules of Appellate Procedure, and refused to exercise its appellate jurisdiction in a way in conflict with applicable decisions of this Court and adequate relief cannot be obtained in any other form or from any other court.

TABLE OF AUTHORITIES

Cases	Page[s]
Bell v. Hart, 143 Tenn. 587, 223 S.A. 996 (1920);	19
Boeing Airplane Co. v. Board of County Comrs., 164 Kan. 149, 188 P. 2d 429, 11 ALR 2d 350;	16
Cannon v. Mathes, 55 Tenn. 504 (1872);	18,20
Capri Adult Cinema v. State, 537 S.W. 2d 896;	21
Com. of Virginia v. Rives, 100 U.S. 313, 25 L.Ed. 667;	27
Davis v. Hailey, 143 Tenn. 247, 227 S.W. 1021 (1921);	19
Donnelly v. Montague, 305 Mass. 14, 24 N.E. 2d 864;	16
Elliott v. Fuqua, 185 Tenn. 200, 204 S.W. 2d 1016 (1947);	19
Ex parte Parker, 9 S.Ct. 708, 131 U.S. 221, 33 L.Ed. 123; also see 7 S.Ct. 767, 120 U.S. 737, 30 L.Ed. 818;	27

Hudson v. Parker,
15 S.Ct. 450,
156 U.S. 277,
39 L.Ed. 424; 27

Huffman v. State,
292 S.W. 2d 738; 15,23

Hyman v. State,
87 Tenn. 109,
9 S.W. 372 (1888); 18

Mayor of Knoxville v.
Lewis,
80 Tenn. 180, (1888); 18

Mark v. State,
578 S.W. 2d 78; 21

Memphis St. Ry. v. Byrne,
119 Tenn. 278,
104 S.W. 460 (1907); 19

Polluck v. Minneapolis &
St. L.R. Co.,
43 SD 456, 180 N.W. 61; 16

Rudd v. State,
497 S.W. 2d 746
(Tenn. Crim.App.,1973); 17

Sheehan v. Industrial Com.,
272 Wis. 595,
76 N.W. 2d 343; 16

Shields v. Williams,
159 Tenn. 349,
19 S.W. 2d 261 (1921); 19

State ex rel Knight v.
McCann,
72 Tenn. 1 (1879); 18

State v. Bethel,
3 Shannon's Cases 107
(1879); 20

State v. Daugherty,
et al.,
196 S.W. 2d 627; 26

State v. Hayes,
116 Tenn. 40,
93 S.W. 98 (1905); 19

Tipton County v. Rogers
Locomotive & Machine Works,
103 U.S. 523,
26 L.Ed. 340; 20

United States v. Corrick,
298 U.S. 435, 80 L.Ed. 1263,
56 S.Ct. 829, reh. den.
298 U.S. 692, 80 L.Ed. 1409,
56 S.Ct. 951; 16

United States Constitution

Fifth (5th.) Amendment; 9

Fourteenth (14th.) Amendment; 10

United States Codes

Title 28, §1651(a),U.S.C.; 9

State Statute

§ 39-13-102, Tennessee Codes Annotated
[TCA, hereinafter] 43, 44

Tennessee Constitution

Article II, § 17 10

PETITION FOR WRIT OF MANDAMUS AND INJUNCTION

Comes the Petitioner, Jessie D. McDonald, Pro se and submit this application for writ of mandamus and injunction, and pray this Court to compel the state supreme court to perform a ministerial duty and render a final decision on the pending application for permission , which was filed on or near, November 17th., 1992; and to enjoin further proceedings in the trial court until such a time, a final decision has been rendered by this Court, on this application, to determine jurisdiction of the trial court.

Opinions Below

On September 17th., 1992, the trial court entered an order, denying the Motion to Dismiss. [Appendix "A"]

On September 24th., 1992, the trial

court entered an order, denying the Motion to Rehear. [Appendix "B"]

October 23rd., 1992, the Court of Criminal Appeals, denied the application for extraordinary appeal. [Appendix "C"]

November 23rd., 1992, the Court of Criminal Appeals, denied the Motion to Reconsider. [Appendix "D"]

Jurisdiction

This Court has appellate jurisdiction pursuant to 28, § 1651(a),U.S.C., to issue a writ of mandamus and injunctive relief to maintain status quo, pending a final disposition on this application.

Constitutional Provisions

Fifth [5th.] Amendment to the United States Constitution:

> ". . ., nor be deprived of life, liberty or property, without due process of law;"

Fourteenth [14th.] Amendment to the United States Constitution:

"Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property , without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws."

Article II, §17 of the Tennessee State Constitution.

Sec. 17. Origin and frame of bills;

" Bills may originate in either house; but may be amended, altered or rejected by the other. No bill shall become a law which embraces more than one subject, that subject to be expressed in the title. All acts which repeal, revive or amend former laws, shall recite in their caption, or otherwise, the title or substance of the law repealed,revived or amended."

Statement of the Case

This matter arose in January of 1992, as a result of a dispute between two taxicab drivers, for different taxicab

companies, which are in competition and has been involved in a legal dispute since 1986.

Jessie D. McDonald, driver for the Yellow Cab Co.,Inc. of Franklin and Brentwood, Tennessee was dispatched to pick up a passenger at the Comdata Co., on Maryland Way, in Brentwood, Tennessee, to take a passenger to the airport, which is located in Nashville.

Upon the passenger entering McDonald's cab, a request was made for McDonald to drive to the Ingram Bldg., in Nashville, so two additional colleagues of the passenger could be picked up, since they all came in together, on an earlier flight that same day. McDonald arrived at the Ingram Bldg., on Harding Road, in Nashville and picked up the two additional passengers and proceeded to leave for the airport.

Upon McDonald entering the exit of the driveway, a taxicab driven by Robert Baker

proceeded to block the path, to prevent McDonald from leaving, on three separate occasions, after McDonald backed his car to allow Baker to enter the parking lot. Baker did not attempt to locate his passengers, but assumed that McDonald had his fare and proceeded to interfere with the lawful operation of McDonald's cab. [Transcript (Tr.,hereinafter), Pages 18 to 21.

At the preliminary hearing, Baker testified that, he did not know McDonald and further stated:

> " ... when I arrived there at this particular place, there was one driveway leading into a deadend area. There was a truck that had the ingress and egress blocked down to one lane, and when I arrived, Mr. McDonald was about to pull out, and I was about to pull in. I knew he had my fare, and I wasn't going to give it up. . ."
>
> Tr., Pages 3-13

At the conclusion of the hearing, the judge bound the case over to the grand jury.

McDonald filed his Motion to Dismiss, on grounds: (1) The circumstances of this case failed to establish a criminal offense; and (2) §39-13-102,TCA is unconstitutional and void for being in violation of Article II, §17 of the Tennessee State Constitution.

The trial court denied the motion to dismiss and the motion to rehear.

McDonald sought an extraordinary appeal to the court of criminal appeals, pursuant to Rule 10 of Appellate Procedure, which was denied ; and the motion to reconsider was likewise denied.

McDonald filed his application for permission to appeal to the state supreme court, pursuant to Rule 11, of appellate procedure, to obtain a uniformity of decision, since the state supreme court has previously held that, assault with an automobile, even if intended, is not aggravated assault, and is only assault and battery. McDonald further requested

the state supreme court to determine the constitutionality of the statute, which this prosecution is based on. The application was submitted in November of 1992, and the state supreme court has refused to enter a final decision on that application, to this date.

REASONS FOR GRANTING THIS APPLICATION

In support of this application, it is the belief of the petitioner, that this application should be granted for the following reasons:

I.
LACK OF JURISDICTION

The trial court lacks jurisdiction to prosecute this matter, based on the fact, there has been no criminal offense committed, within the meaning of the laws of the State of Tennessee.

In the instant case, at the preliminary hearing, Robert Baker testified that he was the aggressor through the entire incident which resulted in his minor

injuries, and to the fact, he did not know McDonald, prior to the incident at issue. [Tr.,Pages 3-14]

He further testified to the fact, McDonald had the passengers in his taxicab, when he arrived on the scene where the incident occurred, and he was using every means to prevent McDonald from leaving the property, which resulted in him being struck by McDonald's taxicab and a warrant being issued against McDonald, on the charge of aggravated assault.

First, it is clear that there is a need for the uniformity of decision in this matter, since the state supreme court has previously held that: "even if the assault with the automobile , was with intent, is not aggravated assault and is only assault and battery. Huffman v. State, 292 S.W. 2d at 738, and therefore that decision is binding on the trial court, until a different judgment is rendered by the state supreme court, or this Court.

The Court of Criminal Appeals, in denying the application for extraordinary relief, under Rule 10 of Rules of Appellate Procedure, under the theory that this is not a proper case for extraordinary appeal, has created a conflict with a previous decision of this Court, in case United States v. Corrick, 298 U.S. 435, 80 L.Ed. 1263, 56 S.Ct. 829, reh. den. 298 U.S. 692, 80 L.Ed. 1409, 56 S.Ct. 951 and several courts of final resort for other states, as shown in the following cases: Boeing Airplane Co. v. Board of County Comrs., 164 Kan. 149, 188 P. 2d 429, 11 ALR 2d 350; Polluck v. Minneapolis & St. L.R. Co., 43 SD 456, 180 N.W. 61; Sheehan v. Industrial Com., 272 Wis. 595, 76 N.W. 2d 343. The judgment or decree of a court that lacked jurisdiction will be reversed on appeal whenever the case is brought before the appellate court. Donnelly v. Montague, 305 Mass. 14, 24 N.E. 2d 864. Like the Court of

Appeals, the Court of Criminal Appeals is an intermediate appellate court is bound by the rulings of the state supreme court. Rudd v. State, 497 S.W. 2d 746 (Tenn. Crim. App.,1973).

Secondly, McDonald has shown the state courts that §39-13-102,TCA, is in violation of Article II,§ 17 of the state constitution, for having more than one subject, and the body is broader than its caption. If this Court will examine §39-13-102,TCA, it can be seen that the title of the statute merely states: "Aggravated Assault" and the body tends to take on three(3) topics, which are: (a) there is a definition of the required elements to constitute the charge, (b) there is a classification of the degree of the charge and (c) there is an enhancement factor which tends to apply the statute on a discriminatory basis, when the victim is a law enforcement officer, firefighter, probation officer, or parole officer

performing an official duty.

There can be no dispute that this statute is void and in violation of Article II, §17 Of the Tennessee Constitution, for having more than one subject. This section of the state constitution, which requires all acts to embrace only one subject, and that " no bill shall become a law which embraces more than one subject", is mandatory and imperative and not merely directory. It is a plain, direct, positive, imperative, absolute and unconditional limitation upon legislative power. Cannon v. Mathes, 55 Tenn. 504 (1872); State ex rel Knight v. McCann, 72 Tenn. 1 (1879); Mayor of Knoxville v. Lewis, 80 Tenn. 180 (1883);Hyman v. State, 87 Tenn. 109, 9 S.W. 372 (1888). The state courts are not clothed with dispensing or enlarging power and the subject matter of the body of the act must be restricted to the single, though narrow, subject stated in the

title. Hyman v. State, supra; State v. Hayes, 116 Tenn. 40,S.W. 98 (1905); Memphis St. Ry. v. Byrne, 119 Tenn. 278, 104 S.W. 460 (1907). The one subject clause of the state constitution was intended to prevent a combination in the same act of laws upon wholly different subjects, to avoid the union of incongruous matters in one statute, and to secure unity of purpose in legislative enactments. Davis v. Hailey, 143 Tenn. 247, 227 S.W. 1021 (1921); Bell v. Hart, 143 Tenn. 587, 223 S.A. 996 (1920); Shields v. Williams, 159 Tenn. 349, 19 S.W. 2d 261 (1921) and to prevent omnibus legislation and confusion in the minds of the legislature and misleading as to the real purpose and scope of acts brought before the legislature. Elliott v. Fuqua, 185 Tenn. 200, 204 S.W. 2d 1016 (1947). At any rate, the whole legislative act is a nullity where it embraces more than one subject, though only one subject

be expressed in the title. Cannon v. Mathes, 55 Tenn. 504 (1872); State v. Bethel, 3 Shannon's Cases 107 (1879).

Further, Section (b) of § 39-13-102,TCA, was intended to enhance the punishment, when the victim is a "law enforcement officer, firefighter, probation or parole officer", and this section alone, clearly renders that statute void, based on the fact, it is designed to distribute unequal punishment to the defendants, based on the victims occupation. That being the case, this Court has previously held that " a law which do not alike embrace all persons and equally affect all persons who exist or might come into like state and circumstances, was a partial and special law and hence, not the law of the land, within the meaning of the United States Constitution of 1796. Tipton County v. Rogers Locomotive & Machine Works, 103 U.S. 523, 26 L.Ed. 340. Under such

conditions, an unconstitutional criminal statute is void from the date of its enactment and there can be no conviction thereunder. Capri Adult Cinema v. State, 537 S.W. 2d 896.

II.

LACK OF CRIMINALITY

The circumstance in this case, has failed to meet the requirement for a criminal prosecution, in that the circumstance in the trial court are the exact same as presented in a preliminary hearing in the General Sessions Court. There is no constitutional right to a preliminary hearing in the state court, but once a preliminary hearing has been granted and concluded, the preliminary hearing is considered a critical stage of a criminal prosecution, marked by statutory law and is adversary proceeding at which usual rules of evidence apply. Mark v. State, 578 S.W. 2d 78.

The question to be determined by this Court is: Whether the circumstances in this case indicate that the requirements for "intentionally, knowing or recklessly" is met, to justify a criminal prosecution on either aggravated assault or assault and battery charges ?

At the preliminary stage, Robert Baker stated that, when he arrived at the scene, McDonald had three(3) passengers in his cab and attempting to leave, when he blocked the exit to prevent McDonald from leaving. [Tr.,P.4, lines 23,24] He further stated that he knew that McDonald had his fare (without asking) and he had no intentions of "giving it up".[Tr.,p.4] Baker stated that he parked his cab to the side, so traffic could pass. [Tr.,P.5] but this is the path where Baker was struck. Even Baker admitted that McDonald offered his apology for the incident.[Tr.,p. 7,8]

To enable this Court to have a clear vision of this matter, to render a fair

decision on the questions presented for review, the petitioner brings this Court's attention to a previous decision, involving a similar situation and circumstances, in Tennessee, in case of ,Huffman v. State, 292 S.W. 2d 738 at 739, the court stated:

"... This is one of those cases occurring during the telephone strike in the early part of 1955. On April 15, of that year, the prosecutor R.H. Ford was a nonstriking employee at Morristown. About 10:00 in the evening he had finished his duty and he in the company with two other people went to where their car was parked for the purpose of going home. The proof showed that the plaintiff in error (Huffman) was engaged in walking the picket line in front of the telephone building. Upon seeing the prosecutor leaving the telephone building on his way home, Huffman left this picket line and got in his automobile with three women who seated therein. Huffman immediately turned his car around and proceeded to chase the automobile that Ford was driving."

However, an accident resulted, where conflicting statements were given and each claimed the other was at fault. Ford said that Huffman rammed his car from the rear and Huffman said that Ford stopped his car and put his car in reverse and backed into

his car.

Since the witnesses in each car supported the testimony of the driver of the car they were in, the court was compelled to consider the conduct that led to the incident, and stated:

" [1] Under the evidence as submitted to the jury, we think that the jury was well warranted in looking to the conduct of Huffman prior to the incident and leading up to the accident in determining the question. Ford, the prosecutor, seemed to have been going about his way in a very peaceful manner, taking his two passengers to their neighborhood where they lived. When he left the telephone building, Huffman and his companions got into the car and gave pursuit. Quite obviously, the jury did not believe them but credited the prosecutor and his companions who were the witnesses for the state. . ."

However, in the instant case, Robert Baker, is a driver for the Yellow Cab Metro,Inc., and the Petitioner, McDonald is a driver for the Yellow Cab Co.,Inc., which are two different taxicab companies, which have been involved in a legal dispute since 1986.[Tr.,P.3] and [Tr.,P.18]

When Baker arrived on the scene, McDonald had the passengers in his cab and was attempting to leave, in a peaceful manner. Baker admitted blocking the path of the exit [Tr.,P.4, line 23,24], but McDonald stated that Baker blocked his cab on three(3) separate occasions, after he backed up to allow Baker to enter the parking lot. [Tr.,p.20,lines 12,13]

McDonald waited for Baker to exit his vehicle to the point he could not get back in to move the cab, and proceeded to go around him and his cab, in an effort to leave the parking area, when Baker jumped in front of McDonald's cab. [Tr.,Pages 20,21]

At any rate, it is clear that McDonald had the passengers, and both drivers stated that one did not know the other, so there was no motive to justify an assault on Mr. Baker. However, Baker stated that it was his intentions to stop McDonald, therefore, even under the theory that the

state has chosen, it is clear that McDonald and his passengers were under attack, by Baker, and was not under any obligation to wait until his adversary strikes a blow before he takes steps to prevent the blow. State v. Daugherty, et.al, 196 S.W. 2d 627. The affidavit which Baker signed to obtain the warrant, clearly show minor injuries, which resulted in no time off his job.

The only witness [Phillip Bryant] testified to the fact, Baker was struck by McDonald's cab [which McDonald will agree to stipulate] and did not know any specifics concerning the conduct of either driver.[Tr., pages 15-18]

CONCLUSION

The Petitioner has properly presented this matter to the state supreme court, for a decision but the said court has so far, refused to render a final decision on the pending application for permission to

appeal to the Tennessee Supreme court, and has refused to exercise its appellate jurisdiction.

Though the discretion of a judge in a matter intrusted to his judicial discretion cannot be controlled by mandamus,yet, if he declines to exercise his discretion or to act at all, mandamus will lie to compel him to act. Hudson v. Parker, 15 S.Ct. 450, 156 U.S. 277, 39 L.Ed. 424 and mandamus lies to compel a court to take jurisdiction upon appeal of a cause improperly dismissed by it. Ex parte Parker, 9 S.Ct. 708, 131 U.S. 221, 33 L.Ed. 123; Ex parte Parker, 7 S.Ct. 767, 120 U.S. 737, 30 L.Ed. 818 and mandamus may be used to restrain inferior courts to keep them within their lawful bounds. Com. of Virginia v. Rives, 100 U.S. 313, 25 L.Ed. 667.

RELIEF SOUGHT

Wherefore the Petitioner, Jessie D. McDonald, pro se pray this Court to issue

a temporary injunction, to maintain status quo, pending a final decision on this application and upon a final decision, grant relief as follows: (1) Issue a writ of mandamus to compel the state supreme court to take jurisdiction on the application for permission to appeal to the state supreme court; (2) Issue a writ of mandamus to compel the state supreme court to act and render a final decision on the pending application for permission to appeal; and (3) Upon a final conclusion of this matter, issue a permanent injunction, to enjoin any and all further attempts to prosecute this matter; and all other and further relief this Court deems proper.

This being the 1st., day of March, 1993.

Respectfully submitted,

_____

Jessie D. McDonald, Pro se

PROOF OF SERVICE

I, Jessie D. McDonald after first being duly sworn to, in accord with the laws of Tennessee, states that, three(3) copies of this application was served upon each judge in the Tennessee Supreme Court, by depositing the same in the U.S. Mail, on this 3rd., day of March, 1993, with the proper first class postage affixed thereon at the addresses shown in this petition, on page 45.

_____
Jessie D. McDonald

COUNTY OF DAVIDSON)
STATE OF TENNESSEE)

_____
Notary Public

My Commission Expires: May 25th., 1995

APPENDIX

TABLE OF CONTENTS

	Page[s]
Respondents	
Order of Trial Court [Appendix "A"]	31-36
Order denying Motion to Reconsider [Appendix "B"]	37-40
Order of Court of Criminal Appeals, denying application for Extraordinary Appeal [Appendix "C"]	41
Order of Court of Criminal Appeals, denying Motion to Reconsider [Appendix "D"]	42
§ 39-13-102,TCA [Appendix "E"]	43,44

Appendix"A"

IN THE CRIMINAL COURT
FOR DAVIDSON COUNTY,TENNESSEE
DIVISION II

STATE OF TENNESSEE

vs. No. 92-B-812

JESSIE D. McDONALD

ORDER

This cause came to be heard on September 8, 1992, upon defendant's Motion to Dismiss the indictment against him alleging violation of Tennessee Code Annotated § 39-13-102.

The defendant raised and argued four issues at the time of the hearing. First, the defendant contends that Tennessee Code Annotated §39-13-102 contains more than one subject in violation of both Article II,§17, of the Tennessee Constitution and of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. Secondly, the defendant contends that an automobile does

not constitute a deadly weapon under Tennessee Code Annotated §39-13-102(1)(B) with respect to the offense of aggravated assault. Thirdly, the defendant contends that the indictment against him does not provide sufficient notice of the offense charged to allow the defendant to prepare an adequate defense and to prevent a second prosecution upon the same charge. Finally, the defendant contends that the facts in this case do not establish that the defendant acted "intentionally, knowingly, or recklessly" as to justify a criminal prosecution for aggravated assault.

As to the first issue, the defendant contends that Tennessee Code Annotated §39-13-102 contains more than one subject in violation of both Article II,§17, of the Tennessee Constitution and of the due process and equal protection clauses of the United States Constitution. Tennessee Code Annotated §39-13-102 defines the

elements of aggravated assault, classifies aggravated assault as a class C felony, and sets forth factors concerning the commission of aggravated assault which justify enhanced punishment for the offense. Upon these facts, the Court is of the opinion that Tennessee Code Annotated §39-13-102 embraces only one subject, namely the criminal offense of aggravated assault, and as such is constitutional under both the United States and Tennessee Constitutions.

As to the second issue, the defendant contends that an automobile does not constitute a deadly weapon under Tennessee Code Annotated §39-13-102(a)(1)(B). Under the current statute, "[a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury" constitutes a "deadly weapon" with respect to elements of a criminal offense.Tennessee Code Annotated §39-11-106(a)(5)(B), since an automobile

is capable of causing death or serious bodily injury through its use or intended use, the Court is of the opinion that an automobile could constitute a deadly weapon under Tennessee Code Annotated §39-13-102(a)(1)(B) with respect to the offense of aggravated assault.

As to the third issue, the defendant contends that the indictment against him does not provide sufficient notice of the offense charged to allow the defendant to prepare an adequate defense and to prevent a second prosecution upon the same charge. The Tennessee Court of Criminal Appeals has held that "[t]he fundamental test of the sufficiency of an indictment is the adequacy of the notice conveyed to the defendant by its terms." State v. Haynes, 720 S.W. 2d 76, 82-83, (Tenn.Cr.App.,1986). Although the indictment charges the defendant with having caused "bodily injury" to the victim rather than "serious bodily

injury", the fact that the indictment specifically charges that the bodily injury was caused by the use of a deadly weapon clearly alleges grounds for the offense of aggravated assault under Tennessee Code Annotated §39-13-102(a)(1)(B) distinguishable from grounds for simple assault under Tennessee Code Annotated §39-13-101. The indictment itself specifically states the above-mentioned section defining the offense of aggravated assault and sets forth elements of the offense in a manner in which a person of common understanding would know what was intended. See, State v. Haynes, supra, 720 S.W.2d 76, 83. Upon these facts, the Court is of the opinion that the indictment against the defendant does provide sufficient notice to the defendant to allow him to prepare a defense and to prevent a second prosecution upon the same charge.

Finally, the defendant contends that

the facts in this case do not establish that the defendant acted "intentionally, knowingly, or recklessly" with respect to the conduct in question. Since the indictment itself establishes that the Grand Jury has found sufficient grounds upon which to prosecute the defendant, the Court is of the opinion that the existence of the defendant's criminal intent is a question of fact for the jury to decide at trial rather than a question of law to be addressed by the Court.

For the above reasons, it is hereby ORDERED, ADJUDGED, and DECREED that the defendant's Motion to Dismiss be respectfully denied. This case is reset for further discussion October 8, 1992, at 1:00 p.m.

Entered this 17th.,day of October, 1992

J. Randall Wyatt,Jr., Judge

APPENDIX "B"

IN THE CRIMINAL COURT
FOR DAVIDSON COUNTY, TENNESSEE
DIVISION II

STATE OF TENNESSEE

VS. No. 92-B-812

JESSIE D. McDONALD

ORDER

The Court has received and reviewed the defendant's Motion to Reconsider the order entered on September 17,1992, denying the defendant's Motion to Dismiss the indictment alleging violation of Tennessee Code Annotated §39-13-102.

In the Motion to Reconsider the defendant raised three issues. First, the defendant contends that the aggravated assault statute,Tennessee Code Annotated §39-13-102, violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution because of the enhancement

factor to be considered at sentencing when the victim is a law enforcement officer, firefighter, probation or parole officer, in the act of performing an official duty. Secondly, the defendant contends that the Court's order conflicts with a prior decision of the Tennessee Supreme Court. Thirdly, the defendant contends that Tennessee Code Annotated §39-13-102 violates Article 2,§17, of the Tennessee Constitution.

As to the first issue, Tennessee Code Annotated §39-13-102 establishes aggravated assault as a criminal offense. Since this statute applies equally and even-handedly to all persons whose conduct is in violation of the statute, the Court is of the opinion that said statute does not create separate classifications in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution. Although the defendant contends that the statute

creates harsher punishments on the basis of the victim's occupation, the statute actually establishes only one factor to be considered, at the time of sentencing, after the defendant has already been found guilty of the offense. Moreover, even if the statute were to establish separate classifications, as the defendant contends, the statute does not involve either a fundamental right or a suspect classification which would require heightened scrutiny by the Court. Since the statute is rationally related to the State's objective of protecting the health and safety of its citizens by making aggravated assault a criminal offense, the Court is of the opinion that Tennessee Code Annotated §39-13-102 does not violate the defendant's right in this case under either due process or equal protection clauses of the Fourteenth Amendment.

As to the second and third issues raised by the defendant, the Court

reaffirms the reasoning and decision set forth in the order entered on September 17, 1992, which denied defendant's Motion to Dismiss the indictment.

For the above reasons, it is hereby ORDERED, ADJUDGED, and DECREED that the defendant's Motion to Reconsider be respectfully denied. This case remains set for further discussion on October 8, 1992, at 1:00 p.m.

Entered this 24th.,day of September,1992

J.Randall Wyatt,Jr., Judge

APPENDIX "C"

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT NASHVILLE

JESSIE D. McDONALD
Appellant.

vs. No. 01C01-9210-CR-00323

STATE OF TENNESSEE,

Appellee

ORDER

The appellant has filed a "petition for Extraordinary appeal" pursuant to Rule 10, Tenn. R. App. P. It does not appear that this is a proper matter for an extraordinary appeal pursuant to that rule.

It is, therefore, ordered, adjudged and decreed by the Court that the "petition for extraordinary appeal" be and same hereby is denied.

Entered this 28th., day of October,1992.

JERRY SCOTT,Presiding Judge

ADOLPH2O A. BIRCH,JR., Judge
(Not participating)

JOHN H. PEAY, Judge

APPENDIX "D"

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT NASHVILLE

JESSIE D. McDONALD
Appellant

vs. No. 01C01-9210-CR-00323

STATE OF TENNESSEE,
Appellee

ORDER

The appellant has filed a motion asking this Court to reconsider its prior order denying his petition for extraordinary appeal pursuant to Rule 10,Tenn. R. App. P. It appears to the Court that the motion has no merit.

It is, therefore, ordered, adjudged and decreed by the Court that the motion to reconsider be and the same hereby is denied.

Entered,this 23rd., day of November, 1992.

JERRY SCOTT, Presiding Judge

ADOLPHO A. BIRCH, JR., Judge
(Not participating)

JOHN H. PEAY, Judge

APPENDIX "E"

39-13-102 - Aggravated Assault

"(a) A person commits aggravated assault who:

(1) Commits an assault as defined in §13-13-101, and:

(A) Causes serious bodily injury to another;or

(B) Uses of displays a deadly weapon; or

(2) Being the parent or custodian of a child or the custodian of an adult,intentionally or knowingly fails or refuses to protect such child or adult from an aggravated assault described in subsection (a); or

(3) After having been enjoined or restrained by an order, diversion or probation agreement of a court of competent jurisdiction from in any way causing or attempting to cause bodily injury or in any way committing or attempting to commit an assault against an

individual or individuals, attempts to cause or causes bodily injury or commits or attempts to commit an assault against such individual or individuals.

(b) Aggravated assault is a class C felony. The court shall consider as an enhancement factor at the time of sentencing that the victim of the aggravated assault was a law enforcement officer, firefighter, probation officer or parole officer performing an official duty.

RESPONDENT[S]

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